Supreme Co
FIL
DEC 8
MICHAEL RODAK,

No. 80-922

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

STATE OF ALABAMA

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

NATHANIEL BACCUS, III
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

JOSEPH M. WOODWARD
Attorney
Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

STATE OF ALABAMA

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether the Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.*, requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	2
Reasons for granting the petition	5
Conclusion	6
Appendix A	1a
Appendix B	6a
Appendix C	8a
Appendix D	32a
Appendix E	47a

TABLE OF AUTHORITIES

Case:	
St. Martin Evangelical Lutheran Church v. *State of South Dakota*, cert. granted, No. 80-120 (Nov. 3, 1980)	5, 6
Constitution and statutes:	
United States Constitution, First Amendment	1, 4
Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.*	2
26 U.S.C. 3301	2
26 U.S.C. 3310(a)	4
26 U.S.C. 3302	2
26 U.S.C. 3304(c)	2
26 U.S.C. 3309	1

PRECEDING PAGE WAS BLANK

Constitution and statutes (continued): Page

26 U.S.C. (1970 ed.) 3309(b) 3
26 U.S.C. 3309(b)(1) 3
26 U.S.C. 3309(b)(1)(A) 5
Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat. 2670 3
28 U.S.C. 2112(a) 4
29 U.S.C. 49d 2

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–5a) is reported at 626 F.2d 366. The decision of the Secretary of Labor (App. C, *infra*, 8a–31a) is published at 44 Fed. Reg. 64378 (1979). The recommended decision of the administrative law judge (App. D, *infra*, 32a–46a) is not reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, 6a–7a; App. E, *infra*, 47a–48a) were entered on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Section 3309 of the Federal Unemployment Tax Act, 26 U.S.C. 3309, provides in pertinent part:

(a) State law requirements

For purposes of section 3304(a)(6)—

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are—

(A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c),

* * * * *

(b) Section not to apply to certain service

This section shall not apply to service performed—

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

STATEMENT

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states.[1] A state qualifies to obtain these benefits within a given taxable year, however, only if the Secretary of Labor certifies on October 31 of that year that the state's unemployment compensation program conforms to the requirements of FUTA. 26 U.S.C. 3304(c). See also 29 U.S.C. 49d; 42 U.S.C. 502(a).

Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employ-

[1]Section 3301 imposes a tax on most private employers equal to 3.2% of the first $6,000 of wages paid each employee. 26 U.S.C. 3301. Section 3302, however, authorizes the employer to claim a credit against this tax liability of up to 2.7% of such wages for contributions to an unemployment fund maintained under a qualifying state law. 26 U.S.C. 3302.

ment by nonprofit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). In the 1976 amendments to FUTA, Congress repealed the third exemption that related to elementary and secondary schools. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat. 2670.

The Department of Labor interpreted the 1976 amendments as requiring the programs of qualifying states to cover employees of all nonprofit elementary and secondary schools, including parochial schools, and notified the states accordingly (App. A, *infra*, 3a). The States of Alabama and Nevada, however, declined to provide such coverage. The States reasoned that in spite of the 1976 amendments, a parochial school is still exempt under the first exemption of Section 3309(b), which applies to a "church" or a church-related "organization *** operated primarily for religious purposes." 26 U.S.C. 3309(b)(1). In addition, the States contended that it would be unconstitutional to require parochial schools to participate in the unemployment compensation system.

The Department thereupon instituted administrative proceedings to determine whether to withhold

certification from Alabama and Nevada for failure to conform to FUTA's requirements. At the administrative hearing, the parties entered into a series of stipulations concerning the operations of Catholic schools in the State of Nevada, and Catholic, Lutheran, and Baptist schools in the State of Alabama. The administrative law judge found that FUTA does not require the states to include parochial schools within the coverage of their unemployment compensation programs and therefore recommended that the Secretary certify that the programs of Alabama and Nevada comply with FUTA (App. D, *infra*, 32a-46a).

The Department of Labor filed exceptions to the recommended decision. The Secretary upheld the exceptions and ruled that FUTA requires the states to provide the coverage at issue (App. C, *infra*, 8a-31a). The Secretary concluded that Congress had intended the 1976 amendments to result in coverage of the employees of all nonprofit schools, including parochial schools (*id.* at 30a). He also rejected the States' contention that this coverage requirement violates the First Amendment (*ibid.*). Accordingly, the Secretary declined to certify that Alabama and Nevada had conformed to the requirements of FUTA (*id.* at 31a).

The States filed petitions for review, which were consolidated in the Fifth Circuit.[2] The court of appeals

[2]FUTA authorizes a state to obtain judicial review of a decision of the Secretary to withhold certification in either the court of appeals for the circuit that includes the state or in the United States Court of Appeals for the District of Columbia Circuit. 26 U.S.C. 3310(a). Following the Secretary's decision, Alabama filed a petition for review in the Fifth Circuit, and Nevada subsequently filed a petition for review in the District of Columbia Circuit. Pursuant to 28 U.S.C. 2112(a), the Nevada review proceedings were transferred to the Fifth Circuit and consolidated

set aside the Secretary's decision, holding that parochial school employees are excluded from FUTA's required coverage under Section 3309(b)(1)(A), which exempts services performed "in the employ of a church * * *" (App. A, *infra*, 1a–5a). The court stated that "[t]here is no question here that the persons performing services in these religious schools fall within the 'in the employ of' language of the statute * * *" (*id.* at 5a). Moreover, the court concluded that the plain meaning of the term "church" requires a definition "as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church" (*ibid.*). Given this disposition, the court did not reach the constitutional question.

REASONS FOR GRANTING THE PETITION

The question presented for review in this case concerning the interpretation of FUTA is identical to that presented in *St. Martin Evangelical Lutheran Church* v. *State of South Dakota*, cert. granted, No. 80–120 (Nov. 3, 1980). Accordingly, this petition should be held pending the disposition of that case.

---

with the Alabama review proceedings. Shortly thereafter, the Fifth Circuit entered an order staying action by the Secretary pending its decision on the merits.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *St. Martin Evangelical Lutheran Church* v. *State of South Dakota*, *supra*, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

NATHANIEL BACCUS, III
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

JOSEPH M. WOODWARD
Attorney
Department of Labor

DECEMBER 1980

APPENDIX A

In the United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 79-3968

STATE OF ALABAMA, PETITIONER,

v.

RAY MARSHALL, SECRETARY OF LABOR,
RESPONDENT.

No. 79-4032

STATE OF NEVADA, PETITIONER,

v.

RAY MARSHALL, SECRETARY OF LABOR,
RESPONDENT.

PETITION FOR REVIEW OF ORDERS OF THE DEPARTMENT OF LABOR

(SEPTEMBER 8, 1980)

Before COLEMAN, *Chief Judge*, RONEY AND GARZA, *Circuit Judges.*

GARZA, *Circuit Judge:*

The question presented for our determination is whether the Unemployment Compensation Amend-

ments of 1976[1] discontinued the Federal Unemployment Tax Act (FUTA)[2] exemption for employees of elementary and secondary church schools. For an understanding of the present controversy a brief review of the relevant FUTA exemptions is in order.

Prior to 1970, FUTA did not require states' unemployment compensation programs to include nonprofit organizations, such as hospitals and schools, within their unemployment compensation coverage. The Employment Security Amendments of 1970[3] required states' programs to include these organizations within their coverage, but the amendments provided two express exemptions of importance to this case. 26 U.S.C. § 3309(b)(1) provided an exemption for service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

Section 3309(b)(3) provided an exemption for service performed "in the employ of a school which is not an institution of higher education."

In 1976, Congress deleted the exemption contained in § 3309(b)(3) thereby requiring coverage of elementary and secondary schools. Following the 1976 amendments, Petitioners, Alabama and Nevada, modified their compensation laws to delete the corresponding exemptions within their program coverage.[4] After over a year of equivocation, the Secretary of

---

[1] Pub. L. No. 94-566, 90 Stat. 2667.

[2] 26 U.S.C. § 3301 *et seq.*

[3] Pub. L. No. 91-373, 84 Stat. 695.

[4] Ala. Code § 25-4-10(b)(21); Nev. Rev. Stat. § 612.121 (1977).

Labor took the official position that the deletion of § 3309(b)(3) required coverage of services performed in all elementary and secondary schools, including church schools. The Secretary's position was and remains that § 3309(b)(1)(B) has no application to church schools and that § 3309(b)(1)(A) applies only to "those strictly church duties performed by church employees at the school pursuant to their church responsibilities."[5] Alabama and Nevada refused to follow the Secretary's interpretation of the law[6] and the Secretary instituted administrative proceedings to withhold certification of Petitioner's compensation programs. After an evidentiary hearing the Administrative Law Judge determined that the Secretary's position was erroneous and recommended that the Petitioner's programs be certified.[7] Feeling that the term "church" should be narrowly defined to include only the physical house of worship, the Secretary rejected the recommendation of the Administrative Law Judge on October 31, 1979 and the Petitioners now seek review of the Secretary's ruling.

---

[5] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978).

[6] The Alabama Department of Industrial Relations refused to comply with the Department of Labor's directive after having been enjoined to do so as a consequence of litigation of this issue in the state courts.

[7] The Administrative Law Judge relied upon both § 3309(b)(1)(A) and (B) and based his recommendation for certification on several reasons: the "plain language" of the statute; the Congressional intent and history; and the probability of state-church "entanglement". We express no opinion on the various holdings of the Administrative Law Judge, but rest our opinion solely on the "plain language" of § 3309(b)(1)(A).

The Petitioners contend that sectarian elementary and secondary schools remain exempt under the "plain language" of § 3309(b)(1)(A) because the services performed by employees of these schools are performed in the "employ of a church." In support of their argument that church schools are within the statute's meaning of "church", the Petitioners point to the uncontradicted evidence in the administrative record showing that: many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts. To support their argument that employees of church schools are in fact employees of the church, the Petitioners point to 26 U.S.C. § 3306(a)(1) which defines "employer" and "any person who . . . paid wages." Additionally, 26 C.F.R. § 31.3121(d)-1(c)(2) (1979) explains that an employer-employee relationship exists when the employer has a right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. Lastly, the Petitioners cite many cases which recognize that services performed by parochial schools are an "integral part" of the religious mission of the governing church. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that a statute must be interpreted according to its plain language unless a clear contrary legislative intention is shown. *See NLRB v. Catholic Bishop, supra; U.S. v. Apfelbaum*, ____ U.S. ____ (1980). Regarding § 3309(b)(1)(A), we can find no clear Congressional intention to desire a result contrary to its plain language. The statute plainly indicates that

the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption applies to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today.

Petition for Review is GRANTED and the Decision of the Secretary of Labor is hereby SET ASIDE.

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By _____
Deputy

New Orleans, Louisiana
Sep. 30, 1980

APPENDIX B

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-4032

STATE OF NEVADA, PETITIONER,

v.

F. RAY MARSHALL, SECRETARY OF LABOR, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE DEPARTMENT OF LABOR

Before COLEMAN, *Chief Judge*, RONEY and GARZA, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the petition of the State of Nevada for review of an order of the Department of Labor, and was urged by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition

for review of an order of the Department of Labor in this cause be, and the same is hereby granted and the decision of the Secretary of Labor is hereby set aside;

It is further ordered that respondents pay to petitioners the costs on appeal to be taxed by the Clerk of this Clerk.

September 8, 1980

Issued as Mandate: SEP 30 1980

A true copy

TEST: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By _____
Deputy

New Orleans, Louisiana

APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF
U.S. DEPARTMENT OF LABOR
v.
STATE OF ALABAMA
DEPARTMENT OF INDUSTRIAL RELATIONS AND
STATE OF NEVADA EMPLOYMENT
SECURITY DEPARTMENT

CONFORMITY PROCEEDING

DECISION OF THE SECRETARY

The unemployment compensation laws of the States of Alabama and Nevada must be determined by the Secretary of Labor, by October 31, 1979, to be in conformity with the requirements of the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), hereinafter referred to as FUTA, in order to be certified under section 3304(c) of FUTA and thereby to have those States receive the benefits for themselves and their inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501-504, and FUTA. Such benefits include federal grants for the administration of their unemployment compensation laws as well as tax credits for private employers within the states. The purpose of this proceeding is to determine whether the

Alabama and Nevada unemployment compensation laws are in conformity and/or in substantial compliance with the requirements of FUTA.

The issue is whether FUTA requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. Alabama and Nevada take the position that it does not. It is the position of the U.S. Department of Labor, hereinafter referred to as the Department or USDOL, that the unemployment compensation laws of such States are not in conformity with the requirements of FUTA, and/or that such States are not in substantial compliance with such requirements, because of the lack of such coverage.

Pursuant to the request of the States of Alabama and Nevada, a hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge, at which an opportunity was afforded to examine witnesses and introduce documentary evidence relating to the issues. Thereafter, parties and interested parties filed briefs and presented oral argument.

On October 11, 1979, the Judge issued a recommended decision in the matter, in which he found that Alabama and Nevada are in compliance with the requirements of FUTA, and he recommended that I so determine.

The U.S. Department of Labor has filed exceptions to the Administrative Law Judge's recommended decision. It contends that the Judge erred in finding that the Alabama and Nevada unemployment compensation laws are in conformity with the requirements of FUTA and that those States are in compliance therewith.

An outline of some of the statutory background would be helpful in the consideration of the issue. During the depression of the 1930's, when unemploy-

ment exceeded 25 percent of the work force in the nation, Congress enacted legislation which was the forerunner of FUTA to provide for the establishment of unemployment compensation programs in the States. Beginning in the mid-1950's, there was a steady expansion of unemployment insurance coverage under the Federal-State unemployment compensation program. For example, originally employers of eight or more employees were covered. In 1954, coverage was extended to employers of four or more employees.

The Employment Security Amendments of 1970 further extended coverage to employers of one employee. In addition, they amended the Internal Revenue Code of 1954 by adding subsections (6)(A) and (B) to the existing section 3304(a), and a new section 3309. The new section 3304(a)(6)(A) required State laws to cover, for compensation purposes, employees of nonprofit organizations and employees of State hospitals and institutions of higher education.

Subparagraph (b) of the new section 3309 permitted the States to exclude, *inter alia*, from the mandatory coverage of nonprofit organizations and State hospitals and institutions of higher education, service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education;

See 84 Stat. 697-698; 26 U.S.C. 3309(b)(1), (b)(2) and (b)(3) (1970).

What followed thereafter is described in the Memorandum of Points and Authorities submitted by the USDOL, hereinafter sometimes referred to as USDOL Memo, at pages 9–11 (footnotes are omitted):

> Even the increasingly expanded Federal-State Unemployment Compensation Program, however, proved inadequate in the 1974-1975 economic downturn. Late in 1974, the Congress passed two remedial laws as temporary measures. The Emergency Unemployment Compensation Act of 1974 (Pub. L. No. 93-573, 88 Stat. 1869) was similar to its predecessor, the Emergency Unemployment Compensation Act of 1971, and further extended benefits for individuals in the regular unemployment compensation programs. The Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845, enacted, in Title II, a Special Unemployment Assistance (SUA) Program. This program was intended to cover an estimated 12 million workers who were not covered by the regular unemployment compensation laws, including state and local government employees, agricultural workers, domestic employees and employees of nonprofit elementary and secondary schools. The SUA program was administered by state unemployment compensation agencies as the agents of the Secretary of Labor, with the federal government assuming the costs of benefits and of program administration.
>
> The SUA program was, in effect, replaced by the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667. These amendments were designed to provide coverage under the permanent Federal-State Unemploy-

> ment Compensation Program for substantially all the nation's wage and salary earners and thereby to eliminate the need for the temporary SUA program. H. R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975). *The 1976 amendments specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools which had been added in 1970 as part of the new § 3309(b) of the Internal Revenue Code of 1954.* (Underscoring supplied.)

The question is whether the 1976 amendment repealing the exemption for nonprofit elementary and secondary schools contained in section 3309(b)(3) of FUTA requires the coverage of church-related schools.

The States of Alabama and Nevada contend, among other things, that under the plain language of section 3309(b)(1) of FUTA (26 U.S.C.3309(b)(1)) church schools are exempt from coverage under FUTA; that the plain language of a statute is controlling unless the legislative history reveals clear evidence of a contrary intent; that church schools are exempt under section 3309(b)(1)(A) because they generally have no separate legal status from their governing church, and because they are an integral part of their governing church; that church schools, and others not technically a legal part of their church, are also excluded from coverage under section 3309(b))(1)(B) because they are operated primarily from religious purposes. Alabama and Nevada argue that the pertinent legislative history does not indicate that Congress intended employees of church schools to be covered under FUTA. It is their position that such coverage would violate the freedoms guaranteed to religious groups under the First and Fourteenth Amendments to the Constitution; that it would involve excessive governmental entanglement in

church affairs, and therefore would be unconstitutional under the tests established by the Supreme Court.

The provisions of 26 U.S.C. 3304(a)(6)(A) and 3309, as amended by the 1976 Amendments, particularly the amendment repealing the exemption for nonprofit elementary and secondary schools provided in section 3309(b)(3), have been interpreted by the U.S. Department of Labor as requiring unemployment compensation coverage of all services performed in the employ of all private nonprofit elementary and secondary schools, including church-related schools, with certain exceptions as provided in 26 U.S.C. 3309(b). In accordance with USDOL's interpretation, the only services performed in church-related elementary and secondary schools recognized as being within the scope of the exemption permitted by section 3309(b)(1) of FUTA, (aside from the permitted § 3309(b)(2) exceptions) are those strictly church duties (as distinguished from school duties) performed by church employees at the schools pursuant to their church responsibilities. (See USDOL Memo, pp. 1-2; Exceptions, pp. 11-13.)

The position of the Department of Labor, as presented on pages 11 through 22 of its Memorandum of Points and Authorities, including the footnotes incorporated therein, is set out below.

I

THE LEGISLATIVE HISTORY OF FUTA SUPPORTS THE DEPARTMENT'S INTERPRETATION THAT ALL CHURCH-RELATED SCHOOLS ARE NOW SUBJECT TO COVERAGE

While FUTA on its face gives little guidance concerning the interrelation between the repeal of the 1970 § 3309(b)(3) school exemption and the retention of the § 3309(b)(1) religious organization

exemptions, its history and remedial purposes militate strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches in Alabama and Nevada (and all other states), within state unemployment insurance coverage.

A. *The Unemployment Compensation Amendments of 1976 represent the culmination of congressional efforts to provide virtually universal unemployment insurance coverage and should be construed in that light*

Since the original enactment of the Federal-State Unemployment Compensation Program, Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments which provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all of the nation's wage and salary earners. H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

This steady progress towards universal unemployment insurance coverage, together with the remedial nature of FUTA, trigger the application of several well-accepted rules of statutory construction, including the requirement that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo* v. *United States*, 272 U.S. 620 (1926); *Holy Trinity Church* v. *United States*, 143 U.S. 457-472 (1892). Statutes must be given effect in accordance with the purpose manifested by Congress. *United States* v. *Ohio*, 354 F.2d 549, 555

(6th Cir. 1966)*[13]; *Commissioner of* Internal Revenue v. *Bilder*, 369 U.S. 499 (1962). This directive takes on particular significance in the context of the instant case since remedial social legislation is to be construed liberally in favor of the workers whom it was designed to protect. *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967)*. See also, *United States* v. *Silk*, 331 U.S. 704 (1947); *Phillips Inc.* v. *Walling*, 324 U.S. 490 (1945); *Israel-British Bank (London) Ltd.* v. *F.D.I.C.*, 536 F.2d 509, 513 (2d Cir. 1976). Finally, there is a requirement that remedial legislation be broadly construed and that exceptions be narrowly applied. *Phillips Inc.* v. *Walling*, *supra*, at 493. See also, *Korherr* v. *Bumb*, 262 F.2d 157, 162 (9th Cir. 1958); *Hamblen* v. *Ware*, 526 F.2d 476, 477 (6th Cir. 1975).[14]

B. *Congress intended the unemployment compensation amendments of 1976 to extend unemployment insurance coverage to services performed for all elementary and secondary schools*

In order to properly understand the objective behind the 1976 Amendments, it is necessary to briefly review the 1970 Amendments.

---

[13] The use of an asterisk (*) denotes the leading case in each line of cases cited for a single proposition.

[14] Under an analogous remedial statute, the Fair Labor Standards Act, it has been held that exemptions are to be narrowly construed against the employer *Schultz* v. *Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 67 (5th Cir. 1970). *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S . 388* (1960); *Mitchell* v. *Kentucky Company*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, (1959); *Yogurt Master, Inc.* v. *Goldberg*, 310 F.2d 53, 55 (5th Cir. 1962).

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required State-law coverage of individuals employed by nonprofit organizations, including institutions of higher education. The legislative reports which accompany the amendments unmistakably show that Congress was concerned about the need of employees of church-related schools for protection against wage loss resulting from unemployment and intended to bring individuals employed in nonprofit instutitions of higher education, including those operated by religious institutions under program coverage. H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969).

In fact, Congress, quite explicitly limited the availability of the § 3309(b) (1) exemption as applied to institutions of higher education. See H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969), and S. Rep. No. 752, 91st Cong. 2d Sess. (1970) at 48-49.[15] Congress clearly expected that the "operated primarily for religious purposes" language contained in § 3309(b)(1)(B) would be narrowly construed, preventing its application to educational institutions of higher education. The Department of Labor has followed the congressional mandate for coverage of private nonprofit organizations, including institutions of higher education, and consistently interpreted the 1970 Amendments to require State law coverage of *all* institutions of higher education except for the narrow category of seminaries and novitiates.

[15] Congress' references to "separately incorporated" institutions in the reports were clearly examples of the delineation of coverage, and were not intended as a full explanation of the extent of such coverage.

In light of Congress' intention in 1970 to bring religiously affiliated colleges and universities within coverage, and in the face of the Department's subsequent adoption of this interpretation, Congress' description, in 1976, of the objective behind the repeal of § 3309(b)(3) is made even more informative. See H.R. Rep. No. 755, 94th Cong., 1st Sess. 56 (1975) and S.Rep. No. 1265, 94th Cong. 2d Sess. 2 (1976).

Any lingering doubt concerning Congress' desire to extend coverage to *all* elmentary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the anticipated effect of the 1976 Amendments. The Senate Report, S. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of § 3309(b)(3) at 242,000. This figure is essentially identical to the then available best estimate of the total number of employees in *all* nonprofit elementary and secondary schools.[16] Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,00 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all nonpublic elementary and secondary schools in the United States.[17]

---

[16] At the September 26, 1979 hearing in this matter it was stipulated between the parties that the 242,000 figure was supplied to Congress by DOL. (Transcript p. 86). Moreover, the testimony of Mr. Louis Benenson at that hearing establishes that the 242,000 figure clearly included all employees of church-related elementary and secondary schools. (Transcript, pp.69–73) See also DOL Exhibits 6–8.

[17] According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time

Thus, in setting forth the projected impact of the repeal of § 3309(b)(3), Congress could only have contemplated that the repeal of § 3309(b)(3) would bring *all* ememtary and secondary schools within FUTA coverage. Considering the total absence of any indication that Congress intended an alternative interpretation, and noting particularly the necessity that the exceptions to coverage be construed narrowly, the Department's construction of the Act is virtually mandatory.

II

THE GENERAL PRINCIPLE OF CONSTRUING STATUTES TO AVOID UNNECESSARY CONSTITUTIONAL DECISIONS IS INAPPLICABLE IN THIS CASE.

The general principle that a court should construe a statute to avoid unnecessary constitutional decisions is inapplicable in this case, because the Department's interpretation that due to the elimination of the exemption formerly provided in 26 U.S.C. § 3309(b)(3), church-related schools are now subject to unemployment insurance coverage is correct in light of the legislative history discussed above and, in any event, does not present any constitutional infirmities. There are two reasons why the Department's interpretation does not give rise to any constitutional problems.

First, unemployment insurance coverage of church-related elementary and secondary schools does not create excessive entaglements. To the contrary, the necessary involvement between such

teachers in the nonprofit elementary and secondary schools in 1975, of which 150,000 were in Roman Catholic schools, pp. 145, 147, tables 235, 237. * * * Compare DOL Exhibits 6–8.

schools and the government would be minimal. While certain records would have to be maintained and determinations of eligibility for benefits would have to be made, there would be no need to become involved in such issues as resolving disputes as to church doctrines in order to resolve claims for benefits. See the testimony of Mr. Bernard Street (Transcript, pp. 107–108). With respect to this point it is noteworthy that the First Amendment does not prohibit all involvement between church and state, but merely entaglement which is deemed *excessive*. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Moreover, not all procedures for surveillance and auditing result in excessive government entanglement with religion. See, e.g., *Wolman* v. *Walters*, 433 U.S. 299 (1977); *Committee for Public Education* v. *Levitt*, 461 F. Supp. 1123 (S.D. N.Y. 1978). If the surveillance and monitoring occur primarily at the governmental level and do not require interference with the internal operations of the schools, the entanglement is not excessive. *Committee for Public Education* v. *Levitt, supra.*[18] Consistent with the cases just cited, the amount of involvement between government and churches resulting from an adoption of the Department's interpretation of 26 U.S.C. § 3309(b) cannot reasonably be viewed as rising to the level of excessive entanglements.

[18]These very same arguments were recently made on behalf of the Archidiocese of Milwaukee, et al. as intervenors in *Alice Decker, et al.* v. *USDOL, et al.*, E.D. Wisconsin, C.A. No. 78–C–634 in a memorandum in support of the intervenors' motion for reconsideration and amendment of the court's Decision and Order enjoining the state and federal administrators of Title II of the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C. § 841, *et seq.* (CETA), from funding CETA positions in church-related elementary and secondary schools.

The second reason why the Department's interpretation of § 3309(b) does not present constitutional infirmities is that, with one exception not here relevant,[19] FUTA does not *mandate* that state unemployment insurance laws deny any individuals unemployment benefits. Thus, while 26 U.S.C. 3304(a)(10) permits the state to provide for the denial of benefits to individuals discharged for misconduct in connection with their work, etc., the state is not *required* to provide for such a denial.[20]

Thus, even assuming, *arguendo*, that the extension of coverage to church-related elementary and secondary schools would result in excessive entanglement as a result of current provisions of state law regarding the denial of benefits for misconduct, etc., the above factor, we submit, precludes a holding that the Department's interpretation of FUTA is facially unconstitutional on entanglement grounds since the Departments interpretation does not necessarily result in the type of entanglements about which Alabama and Nevada are so concerned. It is in this context that it is also appropriate to consider the recent decision in *N.L.R.B.* v. *Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979) in which the court found that the National Labor Relations Act (NLRA) coverage of parochial schools raised "serious constitutional questions" (albeit without finding unconstitutionality). The Court expressed two concerns

[19] Section 3304(a)(6)(A) of FUTA precludes payment of benefits to teachers unemployed between academic terms under certain circumstances.

[20] See section 25-4-78-(3), Code of Alabama 1975, Alabama Exhibit, para. 79, and section 612.385 of Nevada Revised Statutes (1979) and Nevada Exhibit A, paragraphs 40 through 44.

in that case, one of which can be best described as involving the "chilling effect" of mandatory collective bargaining on the ability of clerical authorities to administer their schools and the other relating to the potential problems created by requiring the Board to adjudicate employer/employee disputes in a sectarian school setting. Unlike the situation in the *Catholic Bishop* case, *supra*, unemployment insurance coverate does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. In fact, the unemployment insurance system would generally only be triggered *after* an employee had been terminated and his or her connection with the school severed.

To the extent that it may be argued that the second area of the Supreme Court's concern regarding unfair labor practice adjudications in *Catholic Bishop*, *supra*, raises some possible parallels with certain aspects of the unemployment insurance system, it must be recognized that these problems arise bacause of state law provisonns and not because of the Department's interpretation of § 3309(b) of FUTA. The point to be made is simply that potential entanglements cannot be used to negate unemployment insurance coverage for former employees since coverage itself does not *inevitably* create any entanglements.

The *Catholic Bishop* case, *supra*, is further distinguishable in that despite coverage by a state unemployment insurance law, the church school employer remains free to employ or not employ any individual it chooses on whatever basis it desires. The only impact of unemployment insurance coverage is that some of these decisions will now

have some financial impact, albeit an impact no greater than that borne by private non-sectarian schools. The concept that the first amendment protects both the practice of religion and also spares one the financial burdens of such practice was rejected in *Braunfield* v. *Brown*, 336 U.S. 559 (1961) where the Court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive.

Nor is there any basis whatsoever for DIRSA's [the Department of Industrial Relations of the State of Alabama's] and NESD's [the Nevada Employment Security Department's] apparent belief that employer/employee relations of church-related schools in Alabama and Nevada respectively are constitutionally immune from such impact. Clearly, they can claim no exemption from child labor laws, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) or minimum wage requirements, *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), certiorai denied, 347 U.S. 1013 (1954). Moreover, DIRSA and NESD acknowledge the authority of the government to require and the obligation of church-related schools in Alabama and Nevada respectively to maintain a safe workplace. Alabama Exhibit A, para. 67; Nevada Exhibit A, para. 12.

The right of individuals to send their children to religiously sponsored schools has been established for more than fifty years. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Department seeks no alteration in that principle. The Department's interpretation of § 3309(b) of FUTA will not require an examination into the religious motivations or religious doctrine of church-related

> elementary or secondary schools or in their employment decisions. The Department's position is uncomplicated. Employees of *all* elementary and secondary schools who become unemployed are entitled to coverage. Where such school activities have been performed by the claimant section 3309(b)(1) or the equivalent state law provision is not available as an examption because coverage of elementary and secondary school activity was intended by Congress to protect former school employees from the vicissitudes of unemployment. To conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution.

The Department of Labor takes exception to a number of statements, findings and conclusions contained in the Judge's recommended decision in this proceeding, as well as to his failure to make certain findings of fact. On page 8–10 of the Department's Statement of Exceptions, hereinafter referred to as Exceptions, it states:

> The primary exception which USDOL takes to Part III [of the Judge's recommended decision, on pages 4–5 thereof] stems from the conclusion expressed in the first paragraph of that section to the effect that, since "(e)ssentially all the facts relevant to the issues presented have been stipulated by the parties . . . no recommended findings need be made." While the parties did stipulate as to many facts, additional relevant evidence was introduced at the time of the evidentiary hearing as to which the parties did not stipulate. Specifically, this evidence primarily pertained to both (a) the development by USDOL of the 242,000 figure contained in Senate Report No. 1265, 94th

Cong., 2d Sess. 8 (1976), and which was used to explain the estimated number of additional elementary and secondary school employees who would be covered as a result of the repeal of FUTA §3309(b)(3); and (b) the fact that it is unnecessary to get involved in church doctrine in determining whether a former employee of a church-related school is entitled to benefits. Accordingly, USDOL takes exception to the absence of such recommended findings and urges that the Secretary correct this error by adopting the following findings of fact:

(1) Prior to the enactment of the Unemployment Compensation Amendments of 1976, USDOL, at the request of Congressional staff, prepared an estimate of the total number of employees of all non-profit elementary and secondary schools within the United States. The estimate so prepared was 242,000. Tr., 67–73. DOL Exhibits 6–8.

(2) This 242,000 figure represented a statistical determination of the number of non-profit elementary and secondary school employees who were not covered under FUTA prior to the 1976 Amendments. Tr., 75.

(3) USDOL's 242,000 estimate of the total number of all non-profit (church-related and non-church related) elementary and secondary school employees was furnished by USDOL to staff persons in Congress. Tr., 86.

(4) In determining the eligibility of a former employee of a church-related elementary or secondary school for Supplemental Un-

employment Assistance it is unnecessary to determine that which constituted church doctrine and that which did not. Tr., 104-107.

(5) In determining the eligibility of a former employee of a church-related institution of higher education for unemployment compensation it is similarly unnecessary to resolve church doctrine. Tr., 104-107.

(6) In determining the eligibility for unemployment compensation of a former employee of a church-related school who either voluntarily quit or who was discharged for misconduct it is unnecessary to draw a determination as to what constitutes the actual doctrine of the church. Tr., 108. See also Tr., 126-127 & 136. Rather, the relevant inquiry revolves around the understanding of the parties and the intent of the claimant. Tr., 108 & 122-123.

(7) In an unemployment compensation case the person deciding the case does not establish or try to force any change to an employer's work rules. Tr., 123. Similarly, a hearing officer in such a case cannot order reinstatement of the employee in the event a work rule is found to be unjustified. Rather, the only remedy is the grant of benefits. Tr., 124.

In addition, USDOL takes exception to the generalized summary of the stipulated facts concerning the Roman Catholic, Baptist and Lutheran elementary and secondary schools in that the summary as to each of those groups of church-related schools fails to recognize that such

> schools serve the same basic educational purposes and have the same basic academic structure and courses of instruction as non-church-related elementary and secondary schools. Alabama Exhibit A, para. 33, 34, 45, 46, 66, 67, 71; Nevada Exhibit A, para. 11, 12, 17, 32. Further, this summary fails to recognize that these church-related schools are subject to State and local government fire, health and safety requirements. Alabama Exhibit A, para. 47 & 67.

In my opinion, the above-quoted exceptions of the Department are well-founded and valid. I find that the findings of fact recommended by the Department, numbered 1-7, quoted above, are supported by the record and are proper, and I adopt them as my own.

The Department takes exception to the conclusions expressed by the Judge in part V, pages 7-9 of his recommended decision for several reasons, discussed on pages 13-18 of its Exceptions which are set out below, including the footnotes incorporated therein.

> First, little or no weight should be afforded the three cases cited as precendent in this section. This is so because the USDOL was not a party to either *Trinity Evangelical Luthern Church* v. *Department of Industrial Relations*, Case No. CV 78 500325, Cir. Ct. Mobile County, Alabama (January 27, 1979) or *Roman Catholic Church* v. *State of Louisiana*, No. 219, 660, 19th Jud. Dist. Ct., East Baton Rouge Parish, La. (August 31, 1979), and thus did not have the opportunity to present relevant evidence or even its arguments to those courts. While USDOL was a party in *Grace Brethern* v. *State of California*, Case No. CV 79-93, USDC CD Calif. (September 21, 1979) the decision rendered in that case was simply on plaintiffs' motion for a preliminary injunction. Not

only has there not yet been a final hearing in *Grace Brethern*, but consideration is currently being given to filing an appeal from that interlocutory order.

In any event, with respect to these three decisions, it is important to realize that to a great extent the cases went off on constitutional tangents which, in the present proceeding, are both unauthorized and unwarranted.[7] Moreover, by adopting those three decisions here in their entirety, the Administrative Law Judge has inexplicably exceeded his authority by making conclusions of law as to the constitutionality of USDOL's in-

---

[7] See Mr. Streett's testimony at the evidentiary hearing, TR., 103–129, to the effect that in determining a claimant's eligibility for unemployment compensation it is unnecessary for the State to become involved in church doctrine. However, assuming, *arguendo*, that there do exist certain entanglements between covered church-related schools and the State as a result of its administration of its unemployment compensation law, it does not necessarily follow that such State involvement infringes upon the First Amendment rights of church-related schools. See *USDOL's Memorandum of Points and Authorities*, pp. 17–18. See also the decision in *Stewart, et al.* v. *Commissioner*, U.S. Tax Court, No. 1332–78 (July 31, 1979) and *Hatcher* v. *Commissioner*, U.S. Court of Appeals, Tenth Circuit, No. 78–1883 (July 27, 1979). In each of these cases there was a governmental inquiry into the religious beliefs of the taxpayer and of the religious sect in order to determine whether the taxpayer qualified for an exemption on religious grounds from the self-employment tax. In neither case did the court find a First Amendment problem. These cases therefore illustrate that even where there is an inquiry into the religious tenets of a person and/or a particular sect, there is no violation of the First Amendment so long as the provision in question has a secular purpose and it does not foster excessive government entanglement with religion.

terpretation of § 3309 of FUTA. See Rule of Procedure 14 (b). 44 F.R. 47649 (August 14, 1979).

The remaining USDOL exceptions to Part V relate to four "additional comments" contained therein.

With respect to the first additional comment it need only be noted that the Recommended Decision fails to recognize that under USDOL's interpretation of § 3309 of FUTA it is appropriate to first determine the identity of the employing organization in order to determine the applicability of the § 3309(b)(1) exemption and, if the employer may be both a church and a church-related school, to thereafter determine whether the services performed for such employer are church duties or church school duties. If the latter, the § 3309(b)(1) exemption is inapplicable.

The second additional comment essentially states that no reliance should be placed upon the reference in the legislative history to the 242,000 figure previously discussed. USDOL takes exception to this conclusion for the reason that the record reflects the finding stated by Congress that the additional coverage occasioned by the deletion of the old § 3309(b)(3) exemption would amount to 242,000 employees. That number, as evidenced by the record, represented USDOL's best estimate of the total of all (church-related and non-church-related) non-profit elementary and secondary school employees. If any presumption is to be drawn with respect to Congress' understanding of what this figure represented, that presumption must be that Congress considered the testimony and data it received and knew what it said. Any other presumption would be improper. Furthermore, it is apparent from the final sentence of

this second additional comment that the Administrative Law Judge's confusion as to USDOL's position in this case stems from his inability to distinguish between "church functions" and "church-school functions." It is only services related to those latter functions that USDOL contends are covered.

USDOL takes exception to the third additional comment for the reason that the legislative history to the 1976 Amendments to FUTA clearly reflects that Congress intended to extend coverage to all "non-profit elementary and secondary schools" by deleting the exemption previously applicable to such schools. See USDOL's memorandum of Points and Authorities, pp. 11–16. If Congress had intended to limit the extension of coverage to only that small proportion of non-profit elementary and secondary schools which are non-church-related,[8] it is only reasonable that they would have so specified. This inference is strengthened by the fact that coverage of church-related institutions of higher education had been covered since the time of the 1970 Amendments. Even more support for this conclusion can be found in the fact that all non-profit elementary and secondary school employees not otherwise covered by State laws were covered by SUA, and by the fact that the Unemployment Compensation Amendments of 1976 were designed to "eliminate the temporary Special Unemployment Assistance Program" and extend "permanent" coverage to "substantially all the workers . . . covered by SUA." H.R. Rep. No. 94–755 at 17.

---

[8] Fewer than 20 percent of the total of all non-profit elementary and secondary school employees are employed by non-church-related schools. DOL Exhibit 1, pg. 1.

> Finally, USDOL takes exception to the fourth additional comment for the reason that there is no support for the conclusion expressed that the Department's construction of § 3309(b) is inconsistent with other governmental interpretations of the term "church" used elsewhere in the Internal Revenue Code. Nowhere in the Internal Revenue Code is there a definition of the term "church" which includes church-related elementary and secondary schools. Not surprisingly, the regulation relied upon as authority for the proposition stated (26 CFR § 1.1508-1) is non-existent.[9]

After considering all the evidence and arguments concerning the issues, it is my conclusion that the views expressed by the Department of Labor in its Memorandum of Points and Authorities and in its exceptions to the Judge's decision are correct, for the reasons and on the basis of the authorities indicated therein. FUTA, as amended by the 1976 amendments, requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. The legislative history of the pertinent statutes shows that Congress intended to cover such schools under FUTA. Settled principles of statutory construction support such coverage, particularly the rules that remedial social legislation should be liberally and broadly construed as to coverage so as to accomplish its purpose and that exemptions from such statutes should be narrowly construed. I believe that covering such schools under FUTA does not create excessive governmental entanglement with religion and is within the limits of government regulation provided by the Constitution.

---

[9] If the reference was intended to be to 26 C.F.R. § 508-1(a)(3)(a) it is inapposite since that regulation clearly does not define "church" as including church-related elementary and secondary schools.

Accordingly, I find that the Alabama and Nevada unemployment compensation laws fail to conform to the provisions of the Federal Unemployment Tax Act, as amended. In accordance with the last sentence of section 3304(c) of that Act (26 U.S.C. 3304(c)) I find that those States have failed to amend their unemployment compensation laws so that they contain each of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein, specifically the provision required by reason of the enactment of amendments to section 3309(b) of FUTA. I also find that Alabama and Nevada have, with respect to the 12-month period ending on October 31, 1979, failed to comply substantially with that provision.

Dated at Washington, D.C. this 31st day of October, 1979.

RAY MARSHALL
Secretary of Labor

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR

vs.

STATE OF ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS AND STATE OF NEVADA EMPLOYMENT SECURITY DEPARTMENT[1]

Conformity Proceeding

Howard L. Robinson, Esquire
Carl W. Gerig, Jr., Esquire
Charles Raymond, Esquire
Jonathan Waxman, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C. 20210

---

[1] Proceedings against four additional states, Tennessee, Washington, Texas and Michigan, were postponed by agreement of the parties. The following were granted interested party status with rights to submit briefs and participate in oral argument:

Alabama Association of Christian Schools
Ted N. Williams, Esquire
Gibs & Craze
6929 W. 130th Street
Cleveland, OH 44130

Roman Catholic Dioceses of Nashville and Memphis
Dick Taylor, Esquire
300 James Robertson Parkway
Nashville, Tenn. 37201

United States Catholic Conference
George Reed, Esquire
Gerald C. Tobin, Esquire
1312 Massachusetts Ave. N.W.
Washintgon, D.C. 20005

For the Department of Labor

Stuart P. Ross, Esquire
Peter Tredick, Esquire
Allen Snyder, Esquire
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

For the States of Alabama and Nevada

George Cocoris, Esquire
Craig Donley, Esquire
Department of Industrial Relations
State of Alabama
649 Monroe Street
Montgomery, Alabama 36130

For the State of Alabama

John Flangas, Esquire
333 California Avenue
Reno, Nevado 89509

For the State of Nevada

Before: WILLIAM A. GERSHUNY Administrative Law Judge

General Conference of Seventh-day Adventists
Lee Boothby, Esquire
Suite 629
6930 Carroll Avenue
Washington, D.C. 20012

Martha Miles
Thomas G. Keith, Esquire
Legal Services
601 Terry-Hutchens Building
Huntsville, Ala. 35801

Lutheran Church-Missouri Synod
Philip E. Draheim, Esquire
17th Floor
515 Olive Street
St. Louis, Mo. 63101

RECOMMENDED DECISION

This case arises out of the Secretary's interpretation of the 1976 amendment to Section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. 3309(b) (hereafter "FUTA"), as requiring extension of unemployment compensation coverage by states to employees of primary and secondary religious schools. Two states, Alabama and Nevada, construe the statutory provision as exempting such schools from coverage and have been determined by the Secretary to be in noncompliance with FUTA. At stake is their entitlement, under 42 U.S.C. 502-504, to millions of dollars annually through Department of Labor grants to pay for the costs of administering their unemployment laws. At issue is whether Congress intended, under Sec. 3309(b) of FUTA, to provide unemployment compensation benefits to employees of such schools and to fund the program on the basis of an excise tax imposed on the religious schools.[2]

For the reasons expressed herein, I conclude that Congress did not so intend and, accordingly, I recommend that the States be certified by the Secretary as entitled to federal grants to pay for the costs of administering their unemployment laws.

I

Procedurally, this case was initiated by the Secretary's filing of a Notice of Hearing on August 10, 1979. The commencement of this proceeding was preceded

---

[2] At least one state, California, will continue to receive grant monies for the reason that it is "out of compliance" due to a preliminary injunction issued on September 21, 1979 by the United States District Court for the Central District of California in *Grace Brethren Church et al., v. State of California et al.*, No. CV 79-93.

by the Secretary's formal notification to the States of their non-compliance by letter dated July 6, 1979 and their requests for a hearing on July 16 (Alabama) and 17 (Nevada). The Secretary's Notice scheduled the hearing for September 5, 1979 in Washington, D.C. and established rules of procedure which, *inter alia*, required the issuance of a recommended decision by not later than October 17, 1979 and otherwise forbade the administrative law judge from granting continuances which would prevent the issuance of the decision by that date. By Order dated August 10, 1979, a prehearing conference was scheduled for August 27, 1979 to consider stipulation of the record. In addition, pretrial discovery was preliminarily banned. Over the course of several weeks, under the direct supervision of the administrative law judge, the parties were able to stipulate virtually all the facts relating to the state laws and their impact on church schools and to the organization of Catholic, Baptist and Lutheran church schools and their academic programs. An evidentiary hearing was held on September 26, 1979, briefs submitted thereafter and oral argument heard on October 9, 1979. On September 25, one day prior to the hearing, the Secretary offered to consent to a continuance of the hearing and to certify the states as in compliance in 1979, if the states would agree to such a continuance *prior* to the commencement of the administrative hearing. On the morning of the hearing, four states so agreed and the proceedings involving them were severed and continued generally. Alabama and Nevada's counterproposal to proceed with the hearing so as not to unduly inconvenience the large number of out-of-town counsel and then stay further proceedings was rejected by the Secretary.

Against this procedural backdrop, the states contend that they have been denied procedural due process in that their opportunity for an administrative

hearing was grossly restricted by the Secretary's delay in commencing the proceeding and his requirement that a decision be rendered by the administrative law judge by October 17. Whatever the merits of this contention might be, it is clear that, under the Secretary's *ad hoc* rules of procedure, I lack authority to consider and decide the issue. Rule 4 requires issuance of the recommended decision by October 17 and, the record will reflect, there was no remaining time for discovery or other trial preparation. In any event, there is nothing in this record to reflect that either of the states was deprived of an opportunity to offer evidence which it considered vital to its case.

II

The Federal Unemployment Tax Act (FUTA) had its roots in the fertile fields of New Deal legislation of the 1930's. In its original version, 49 Stat. 620, FUTA imposed an excise tax on "for profit" employers with eight or more employees and, as an incentive for the enactment of State unemployment compensation laws, allowed covered employers a credit against federal tax liability for up to 90% of contributions to a federally approved state program and provided for grants to states with qualifying programs to pay for costs of administration. As a consequence, all states enacted mirror images of FUTA

Coverage was broadened in 1970 with enactment of the Employment Security Amendments Act, 84 Stat. 695, which imposed the tax on employers of one or more employees and redefined employer to include non-profit organizations. Included in the 1970 amendments was a new section 3309 to the Internal Revenue Code of 1954, which nevertheless continued the prior exemption of services performed

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education;

In 1974, to combat a severe economic downturn, Congress enacted a Special Unemployment Assistance Program (SUA), 88 Stat. 1845, which temporarily provided benefits, at the sole expense of the federal government, to employees of non-profit elementary and secondary schools, who were not covered under the regular program. Because such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation.

However, the SUA program soon was replaced by the Unemployment Compensation Amendments of 1976, 90 Stat.2667, which, in relevant part, deleted subsection (3) of Section 3309(b). Construing this amendment as evidence of a Congressional intent to provide permanent coverage to all employees of church elementary and secondary schools (except ministers and those performing strictly church duties in the schools) the Department initiated this proceeding to determine whether Alabama and Nevada, which otherwise construed the amendment, are maintaining a "conforming" unemployment compensation program and, thus, are eligible for massive federal grants.

III

Essentially all the facts relevant to the issues presented have been stipulated by the parties. Because no recommended findings need be made, the facts will be summarized only.

Alabama's initial efforts to provide coverage for employees of church related elementary and secondary schools were enjoined permanently on January 19, 1979, in *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, No. CV 78 500325, Cir. Court Mobile County, and preliminarily enjoined on January 22, 1979 in another suit filed by Baptist and Methodist churches. The State voluntarily dismissed its appeal of the former and thereafter ceased its efforts to compel church schools in Alabama to pay unemployment taxes.

Nevada came into "non-compliance" with its factual determination that Roman Catholic elementary and secondary schools, under the State equivalent of subsection (b)(1), were exempt because services in those schools were performed in the employ of the church or a church-controlled organization operated primarily for religious purposes. For purposes of this proceeding, the Department does not challenge the State's factual conclusions.

Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3–5% of the lay teachers are non-Catholic. Teachers are employed by the principal and parish

priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by religious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and paster, are subject to discharge for breach of religious doctrine and must be members of the church.

Lutheran elementary and secondary schools are controlled and operated by the church, which is a tax-exempt corporation. It selects the curriculum and hires and supervises the school staff. The curriculum is similar to that of secular schools. Operating funds are derived by the church and student tuition. Teachers are paid from church funds and school facilities, often located in the church building, are owned by the church. Teachers are subject to discharge for failure to teach church doctrine by word and personal example, both inside and outside the classroom. Religious instruction is required and all subjects are taught in conformity with church doctrine.

If such schools are covered under FUTA, they would be required to maintain employment records, to file periodic reports with the states and respond to individual claims for benefits; would be subject to

periodic examination as to the amount of their contributions and administrative inquiries as to nature and extent of covered services; and would be subject to civil and criminal enforcement procedures. The states would be required to determine whether a claimant was discharged for misconduct or voluntarily left his employment without good cause.

IV

The Department's position in this proceeding is somewhat elusive. On the one hand, it asserts that Congressional deletion of the school exemption in subsection (3) "militates strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches. . ." (Brief p. 11) and that the religious purposes exemption of subsection (1) "is not available as an examption because coverage of elementary and secondary school activity was intended by Congress. . . [and] to conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution" (Brief p. 22). On the other hand, it asserts that subsection (2) exempts ordained ministers and members of religious orders in the exercise of their religious duties in such schools and that the performance of church duties (as distinguished from school duties) by church employees at the schools pursuant to their church responsibilities likewise is exempt under 3309(b)(1). (Brief p. 2)

More specifically, it contends that the words "in the employ of a church" in subsection (b)(1) is intended to refer not to the employing entity, i.e. the religious organization, but rather to the function being performed by the employee, e.g. teaching. The word "church", it argues, refers to the house of worship and not the or-

ganization. Thus, for example, a lay employee of a religious organization teaching religious doctrine at an elementary school conducted by that organization in its house of worship would be covered under FUTA and the exemptive provisions of subsection (b)(1) would be inapplicable.

Its position as to the interpretation of 3309, it argues, raises no constitutional issues because coverage of church schools under FUTA does not create excessive governmental entanglements with the church. In this connection, it contends that neither the program's record-keeping and filing requirements nor its administrative inquiries as to elegibility for benefits would require the government "to become involved in such issues as resolving disputes as to church doctrine in order to resolve claims for benefits" (Brief p. 17).

Not only is the Department's position as to the meaning of section 3309(b) elusive, it has not remained constant. Shortly after enactment of the 1976 amendments, which in part deleted subsection (3) of section 3309(b), the Department formally advised the states that the effect of this change is to mandate coverage of elementary and secondary schools operated by the State and its political subdivisions or by nonprofit organizations" (ALJ Exh. 2, pp. 24–25). Coverage of church schols was not suggested. Thereafter, in a December, 1976 Department memorandum to the states, the following question and answer appeared:

> *Question:*
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
> Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in

> sections 3309(b)(1), (2). . . are still applicable. . . .For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1).

(ALJ Exh, 3, p.5). Having thus affirmed the applicability of the exemptive provisions of section 3309(b)(1) to church schools, the Department went on, in a February, 1977, memorandum to the states, to explain the criteria for determining applicability of the provision:

> Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controllled or principally supported by the church.
>
> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.
>
> The changes made in section 3309 by P.L. 94–566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B).

(ALJ Exh. 4, pp 6–7). Significant is the Department's interpretation of the words "in the employ of a church" as meaning the "employing organization" and not, as presently contended, the physical structure where religious functions are performed

By April, 1978, the Department tacitly rejected its earlier contemporaneous construction of the 1976 amendments and formally adopted the position asserted in these proceedings (DOL Exh. 1). By memoranda dated May 30, 1978 (DOL Exh. 2) and November 13, 1978 (Alj Exh. 7), the Department advised the states that church related elementary and secondary schools were covered and the exemptive provisions of subsection (b)(1)(A) and (B) have no application to church activities performed in church related elementary and secondary schools "since schools are not churches within the meaning of that section" (DOL Exh.2, p. 2).

The position of Alabama and Nevada, supported by a number of religious organizations, is that church schools, being an integral part of the governing church and fundamentally religious in character, are exempt from coverage under the plain language of section 3309(b)(1)(A) and/or (B). Moreover, they contend that, while the legislative history does not specifically address the status of church schools under section 3309(b)(1), it "plainly indicates" a Congressional intent to exempt all services where the church is the employing entity. And, finally, the States argue that the Department's construction of section 3309(b) is impermissible for the reason that it would render the legislation violative of the First and Fourteenth Amendments to the Constitution under the excessive entanglement doctrine established by the Supreme Court.

V

There is no lack of precedent as to the application of Section 3309(b)(1) to church elementary and secondary schools. In each of the three lower court decisions rendered to date, the Department's position has been

flatly rejected as contrary to the plain meaning of the statute, unsupported by the legislative history and constitutionally impermissible. *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, Case No. CV 78 500325, Cir.Ct. Mobile County, Ala. (January 27, 1979); *Roman Catholic Church v. State of Louisiana*, No. 219,660, 19th Jud.Dist.Ct., East Baton Rouge Parish, La. (August 31, 1979); *Grace Bretheren Church v. State of California*, Case No. CV 79-93, USDC, CDCal (September 21, 1979).

The precise contentions of the Department in this case were advanced by the State of Alabama in *Trinity Evangelical* and by the Department itself in *Grace Bretheren*. There, the courts reviewed the legislative history of FUTA, including the 1976 amendments which deleted the school exemption provisions of (b)(3); examined the teachings of the Supreme Court in *NRLB v. Catholic Bishop*, 99 S.Ct. 1313 (1979) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and considered the potential entanglement by the states in religious activities of the church. Their thoughtful and highly persuasive decisions are adopted here in their entirety, with the following additional comments.

First, a construction of the language "in the employ of a church" which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history (H.R.Rept 612, 91st Cong., 1st Sess. 44; "where the employer is the church. . . ."). Moreover, earlier contemporaneous interpretations of the Department's Unemployment Insurance Service, which presumably worked closely with the Congress in the original enactment and subsequent amendment of Section 3309, advised the states that the determination to be made under (b)(1) was the identity of the "employing organization" (ALJ Exh. 4).

Second, the Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data and, admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Third, the notion that complete Congressional silence in the legislative history evidences its intent to cover church schools by deleting the school exemption in subsection (b)(3) is unwarranted in the absence of definitive statutory language. Indeed, where, as here, the Congress manifested concern as to the constitutionality of its coverage of state employees in light of a recent Supreme Court decision (S. Rep. 94-1265, 94th Cong., 2d Sess. 8-9), yet failed even to address the more obvious constitutional question as to coverage of church schools, the only permissible inference to be drawn from that silence is that Congress was acutely aware of the limitations of legislative authority and had not the slightest intention of entangling government in church function.

And fourth, the Department's construction of Section 3309(b) is inconsistent with government interpretations of the term "church", as used elsewhere throughout the Internal Revenue Code, to include church schools. See e.g., 26 C.F.R. 1.1508-1. Common sense, if nothing else, dictates that like terms in a statute be given like interpretations in the absence of a clearly expressed Congressional intention to the contrary. Admittedly, no such expression is to be found in the voluminous legislative history of FUTA.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Secretary make a determination that the States of Alabama and Nevada are in compliance with the Federal Unemployment Tax Act and certify each to be entitled to federal grants to pay for the costs of administering their unemployment laws.

WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: October 11, 1979
Washington, D.C.

APPENDIX E

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 79-3968

STATE OF ALABAMA, PETITIONER,

v.

RAY MARSHALL, SECRETARY OF LABOR,
RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE DEPARTMENT OF LABOR

Before COLEMAN, *Chief Judge*, RONEY and GARZA, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the petition of the State of Alabama for review of an order of the Department of Labor, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition

for review of an order of the Department of Labor in this cause be, and the same is hereby granted and the decision of the Secretary of Labor is hereby set aside;

It is further ordered that respondents pay to petitioners the costs on appeal to be taxed by the Clerk of this Court.

September 8, 1980

Issued as Mandate: Sep 30, 1980

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 333451 160